FILE COPY

Office - Supreme Court, U.
FILED
FEB 28 1950
CHARLES ELMORE CROPL
CLER

IN THE

Supreme Court of the United States

No. 578.

EFFIE EMERSON WALSH, *Petitioner*

v.

BERNARD W. WALSH, *Respondent*

On Petition For a Writ of Certiorari to the Supreme Court of Louisiana.

REPLY BRIEF.

ALVIN L. NEWMYER
DAVID G. BRESS
SHELDON E. BERNSTEIN
Counsel for Petitioner,
1001 15th St., N. W.,
Washington, D. C.

Of Counsel:
NEWMYER & BRESS,
1001 15th St., N. W.,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

No. 578.

EFFIE EMERSON WALSH, *Petitioner*

v.

BERNARD W. WALSH, *Respondent*

On Petition For a Writ of Certiorari to the Supreme Court of Louisiana.

REPLY BRIEF.

In opposition to the petition for a writ of certiorari, advancing substantial reasons for the review of the Louisiana procedure whereunder petitioner was not given notice of or opportunity to be heard in divorce proceedings instituted by her husband, respondent has merely answered that the issue of notice and lack of due process was not properly raised below and that, therefore, it cannot be considered here.

From an analysis of the record, petition, and supporting brief, it is patent that respondent's failure to argue to the merits of the issues presented by the petition is traceable

to an inability to muster any logical support for such a manifestly unconstitutional and unfair ex parte procedure as that provided by Louisiana law.

Petitioner denies that the issues presented in the petition were not raised below, although petitioner concedes that the points might have been more pointedly presented. As shown in the petition, the issue of lack of notice to petitioner of the pendency of divorce proceedings was raised by petitioner's original pleadings in the Bossier Parrish court to vacate and set aside the divorce decree (Pet. 5). But since the trial court disposed of the case favorably to the petitioner by vacating the divorce decree on other grounds raised in the petition, it was unnecessary for petitioner to raise or argue the question of adequate and proper notice in the Supreme Court of Louisiana because the case came to that court in a posture dealing only with the specific grounds upon which it had been disposed of by the trial court in favor of the petitioner. It was not, therefore, until the Supreme Court of Louisiana had reversed the trial court and ordered the divorce decree reinstated that it became necessary again to raise the question of notice and lack of due process, which was immediately done by petitioner in a timely petition for rehearing (See Pet. 7). In similar circumstances, this Court has taken jurisdiction to decide the federal question involved even though the state court did not specifically pass on the point by granting the petition for rehearing and then ruling on the issues thus raised. See *Missouri ex rel Missouri Insurance Co.* v. *Gehner,* 281 U. S. 311, 320 (1930). See also *Wuchter* v. *Pizzuti* 276 U. S. 13 (1928).

This Court early stated that jurisdiction will be taken to decide a federal question appearing and disposed of in the state court proceedings by express averment or by *necessary intendment. Steines* v. *Franklin County,* 14 Wall 15, 20-21 (1872). It is quite obvious in this cause that the due process question with respect to notice was by necessary intendment disposed of against petitioner by the action of

the Supreme Court of Louisiana. As petitioner pointed out in her argument in support of the petition (Pet. 11-12), the Supreme Court of Louisiana had already held, in 1919, that the Louisiana statute was constitutional. Having already decided this question adversely to the position of petitioner, that court would not have been disposed to hold otherwise in this case. This earlier disposition of the constitutional issue, combined with what respondent suggests (Brief in Opp., page 4, fn. 5) is over a century and a half of Louisiana procedure assuming the validity of the statute in question, must necessarily be implicitly read into the action of the Supreme Court of Louisiana in denying the petition for rehearing. And such denial, therefore, must be construed as an implicit affirmation and incorporation of that court's previous constitutional determination in 1919. Thus, the normal reasons for the rule precluding review by this Court of constitutional issues upon which the highest court of the state has not been given timely opportunity to pass do not apply because in this case the highest court of the state previously had such opportunity and exercised it adversely to the position advanced by petitioner.

Finally, it should be noted that respondent completely ignores the second point raised in the petition, wherein petitioner urges that she was denied due process by the determination of the Supreme Court of Louisiana that it was her burden, in proceedings to vacate a default judgment of divorce, to show that the divorce court had originally lacked jurisdiction because of the husband's nonresidence. That question never arose in the trial court, and prior to the opinion of the Supreme Court of Louisiana stating that petitioner had such a burden of proof, petitioner had no intimation that the resolution of the cause might turn upon such a legal conclusion. In these circumstances, petitioner should not be foreclosed from raising the issue in this Court. See, *Missouri ex rel, Missouri Insurance Co.* v. *Gehner, supra.*

In conclusion, petitioner respectfully reiterates, as previously urged in her petition, that the Louisiana procedure pursuant to which a divorce was secured by her husband tolerated such a flagrant disregard of her basic right to notice and an opportunity to be heard that the intervention of this Court is appropriate to remedy this grave injustice.

For the foregoing reasons and the reasons advanced in her petition and supporting argument, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALVIN L. NEWMYER
DAVID G. BRESS
SHELDON E. BERNSTEIN
Counsel for Petitioner,
1001 15th St., N. W.,
Washington, D. C.

Of Counsel:
NEWMYER & BRESS,
1001 15th St., N. W.,
Washington, D. C.